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THE INCOME TAX AND THE NATIONAL REVENUES.

THE income-tax question will not down. Again and again it bobs up, more or less serenely, in party platforms, in the speeches of congressmen and reformers, and even in serious economic literature.[1] Sometimes it is recognized that an amendment to the Constitution may be necessary before a national income tax can be imposed, but more often the partisans of this mode of taxation seem to look forward to a reversal of the supreme court's decision of five years ago, in which, they never tire of reminding us, only a bare majority of the court concurred, and which might therefore be overruled if both of the associate justices appointed since that time should disagree with the former majority. It is therefore important to determine what basis there is for this expectation.

I.

Unless it can be shown that the term "direct taxes" is used in the Constitution in some unusual and esoteric sense, it is not

[1] See for example HOWE, *Taxation in the United States under the Internal Revenue System*; JOHN K. BEACH, "The Income-Tax Decision," *Yale Review*, May 1896; C. J. BULLOCK, "The Direct-Tax Clause of the Federal Constitution," *Political Science Quarterly*, June 1900.

likely that any future decision will declare an income tax to be other than a direct tax. Economists and writers on taxation of every school and all shades of belief agree in classifying this form of taxation as direct. It is true the earlier Physiocrats, because of their peculiar notion that all taxes fell at last upon land, held that the land tax was the only direct tax; but Turgot, the most widely known of all the Physiocrats, enumerated three kinds of taxes: the direct tax on land, the direct tax on persons, and indirect taxes on consumption; and by the direct tax on persons he meant not a uniform poll-tax, but a tax varying with the wealth or income of the taxpayer.[1] Outside of the Physiocratic circle there is practically no dissent from the classification of the income tax as a direct tax, although the definitions of direct taxes vary.[2]

But in determining whether the income tax is direct within the meaning of the Constitution, a more important consideration is of course the intention of the framers of the Constitution. The unanimity of the economists would avail little if it should appear that a different view obtained in the constitutional convention of 1787. But there is nothing to show that such was the case. The writings of the Physiocrats were the only source from which a different view could well have been derived; but the Physiocratic doctrines never gained any general acceptance in America. The *mémoire* which Turgot addressed to Franklin was probably better known in America than were the earlier

[1] "Il est impossible qu'elle soit uniforme." *Oeuvres* (Paris, 1808), iv. p. 209. The French capitation-tax of the eighteenth century was proportioned to the fortune of the subjects, except in the case of the nobility. Adam Smith also meant by "capitation taxes" taxes varying either with the "fortune or revenue" of the taxpayers, or with their rank.

A little further on, Turgot says that the capitation [income] tax is indirect in so far as it applies to certain elements of income, but that the part proportioned to income derived from land is a direct tax. It is interesting to note the correspondence between this classification and the first decision of the supreme court in the income-tax cases of 1895.

[2] John Locke may be said to have hinted vaguely at a different classification in the fugitive pamphlet on money and interest in which he anticipated the Physiocratic doctrine of incidence; for while he made no use of the adjective "direct" as applied to taxation, he did recommend "laying it directly where it will last settle."

Physiocratic writings, but in that paper the terms "direct" and "indirect" tax seem not to have been used.[1] On the other hand, there is every reason to believe that the framers of the Constitution followed the usage of Adam Smith, who eleven years before the convention met had refuted the Physiocratic doctrine as to the incidence of taxes, whose work had gone through several editions before 1787, and who is known to have exerted a very decided influence upon the American leaders of that time. Albert Gallatin, writing in 1796, stated emphatically his belief that the distinction in the minds of the framers of the Constitution was that of Adam Smith.[2] Gallatin was born and bred a Frenchman, and would have been as likely as any American of the time to accept the Physiocratic view; and in the absence of any evidence to the contrary the testimony of such an authority as Gallatin should be considered conclusive in any question of finance. Now Adam Smith gave no formal definitions of direct and indirect taxes, but it is impossible to mistake his meaning. He called taxes on receipts or incomings direct, and taxes on consumption or expenditure indirect.

This, then, was in all probability the distinction in the minds of the members of the constitutional convention. The debates throw very little additional light on the subject, although it is clear that in the mind Gouverneur Morris, who was responsible for the use of the term, the antithesis was between direct taxes on the one hand and customs and excise duties on the other. On the 12th of July, having moved that taxation should be in proportion to representation, Mr. Morris "admitted that some objections lay against his motion, but supposed they would be removed by restraining the rule to *direct* taxation. With regard to indirect taxes on exports and imports, and on consumption, the rule would be inapplicable."[3] Afterward he attempted to have the whole clause stricken out. "Let it not

[1] Possibly the words may have been used in the portion of the *mémoire* which is lost.

[2] *Sketch of the Finances of the United States*, pp. 11–14; cf. ADAMS, *Taxation in the United States, 1789–1816* (*John Hopkins University Studies*, vol. ii), p. 282.

[3] ELLIOT'S *Debates*, v. p. 302; BANCROFT, *History of the Constitution*, ii. p. 83.

be said," he urged, "that direct taxation is to be proportioned to representation. It is idle to suppose that the general government can stretch its hand directly into the pockets of the people, scattered over so vast a country. They can only do it through the medium of exports, imports, and exercises."[1] Mr. King asked "what was the precise meaning of direct taxation," and no one answered.[2] It is not strange, especially in view of Adam Smith's omission to give a formal definition of direct taxes, that the members of the convention had no definition at their tongues' ends, as they would have had if they had accepted the simple Physiocratic distinction. Everyone knew in a general way what direct taxes were, but no one could give a precise definition on a moment's notice. The same difficulty might easily exist even today.

At the close of the convention Luther Martin made a report of its proceedings to the legislature of Maryland, in which he explained and analyzed the proposed taxing power of Congress by distinguishing between "direct taxes, by capitation tax, or by assessment," and "duties, imposts, and excises." These last three words, he explained, meant respectively stamp duties, custom dues, and other taxes on consumption.[3]

In the ratifying conventions of the various states, also, occasional attempts were made to define the term "direct taxes." Thus in the New York convention Mr. Jay said "that direct taxes were of two kinds, general and specific," and that "the objection [then under discussion] could only apply to the laying of general taxes upon all property."[4] In Virginia, Mr. Monroe asked rhetorically: "What is the extent of the power of laying and collecting direct taxes? Does it not give to the United States all the resources of the individual states? Does it not give an absolute control over the resources of all the states?"[5]

Mr. Marshall, afterwards chief justice, following the fiscal usage of the Virginia government, stated that the objects of direct taxes were "well understood," and that they were "lands,

[1] ELLIOT'S *Debates*, v. p. 393. [2] *Ibid.*, v. p. 451. [3] *Ibid.*, i. p. 368.
[4] *Ibid.*, ii. p. 381. [5] *Ibid.*, iii. p. 216.

slaves, stock of all kinds, and a few other articles of domestic property.[1] Two years later Gouverneur Morris seems to have used the term "direct taxes" as practically synonymous with "internal" taxes.

In Hamilton's draft of a constitution it was proposed to apportion only land and capitation taxes; but instead of adopting this proposal, the convention, being as a body much more in favor of decentralization than was Hamilton, extended the rule of apportionment to all direct taxes. Hamilton afterwards expressed his disapproval of apportionment according to population.

When in 1794 it was proposed to tax carriages, Madison, who had been a leading member of the constitutional convention, opposed the tax on the ground that it would be direct, and therefore unconstitutional; while those who supported the measure contended that the tax would be indirect because it would be a tax on consumption. There was a long debate over the point, but no one intimated that direct taxes were only land and capitation taxes. On the contrary, Mr. Sedgwick said "that a capitation tax, and taxes on land, and on property and income generally, were direct charges. . . . He had considered these, and these only, as direct taxes."[2] If income taxes had at this period been more generally known by that name, they would no doubt have been more frequently mentioned as direct taxes.

When the question came before the supreme court, Alexander Hamilton appeared for the government; but while arguing that the carriage tax was indirect, he expressed the opinion that the various forms of direct taxes were "capitation or poll taxes," "taxes on lands and buildings," and "general assessments, whether on the whole property of individuals, or on their whole real or personal estate." Again, he said: "*Duties*, *imposts*, and *excises* appear to be contradistinguished from *taxes*, and while the latter is left to apportionment, the former are enjoined to be uniform."[3] He showed that the English carriage tax was

[1] *Ibid.*, iii. p. 229. [2] Annals of the III Congress, 644.

[3] LODGE'S *Hamilton*, vii. p. 332.

regarded as an excise; an argument which seems to have had much weight with the court. Nowhere, up to this time, is there any trace of the later theory that land and capitation taxes were the only taxes which were intended to be apportioned.

II.

It is usual for critics of the court's latest decision to assert that it reversed several previous decisions of the same tribunal extending over a century of time. This statement in all its varying forms is due to a grave misconception; to an entire failure to distinguish between judicial decisions and more or less irrelevant *dicta*. It refers, of course, to the series of decisions, beginning with the Hylton case in 1796 and ending with the Springer case in 1880, in which the meaning of the term "direct taxes" in the Constitution had been discussed. But does it follow, because Daniel Hylton was obliged to pay the carriage tax on his one hundred and twenty-five chariots a century ago, that an income tax may be levied without apportionment? Let us see.

The only question before the court in the Hylton case[1] was the constitutionality of the carriage tax. The court at that time was in doubt whether it had the power to declare an act of Congress void on the ground of unconstitutionality; but the carriage tax was sustained chiefly because it was regarded as a tax on expense or consumption — in other words, an excise. But the suggestion was made incidentally and with much hesitation, by some of the justices who heard the case, that the only, or at least the principal, direct taxes in the constitutional sense were land and capitation taxes. It is to this doubtful suggestion that the confusion on the subject is primarily due. It has been repeated in its more extreme form and with increased positiveness in succeeding cases and in the text-books, until it has seemed to some to have the force of law. Certainly nothing was farther from the minds of the justices who first made the suggestion.

[1] 3 Dallas 171.

Mr. Justice Chase used the following language:

It seems to me, that a tax on expense is an indirect tax; and I think, an annual tax on a carriage for the conveyance of persons, is of that kind; because a carriage is a consumable commodity; and such annual tax on it, is on the expense of the owner. I am inclined to think, but of this I do not give a judicial opinion, that the direct taxes contemplated by the Constitution, are only two, to wit, a capitation, or poll tax, simply, without regard to property, profession, or any other circumstance; and a tax on land.—I doubt whether a tax, by a general assessment of personal property, within the United States, is included within the term direct tax.

Mr. Justice Paterson was not willing to say, even in this doubtful manner, that land and capitation taxes were the only ones intended; he seems to have had in mind a general property or income tax as coming within the scope of direct taxes. He said:

Whether direct taxes, in the sense of the Constitution, comprehend any other tax than a capitation tax, and a tax on land, is a questionable point. If Congress, for instance, should tax, in the aggregate or mass, things that generally pervade all the states in the Union, then, perhaps, the rule of apportionment would be the most proper, especially if an assessment was to intervene. . . . . I never entertained a doubt that the principal, I will not say the only, objects that the framers of the Constitution contemplated as falling within the rule of apportionment, were a capitation tax and a tax on land. . . . . All taxes on expenses or consumption are indirect taxes. A tax on carriages is of this kind, and of course is not a direct tax. Indirect taxes are circuitous modes of reaching the revenue of individuals, who generally live according to their income.

These definitions of indirect taxes were in entire conformity with the teachings of Adam Smith, and the opinion closed with a quotation from *The Wealth of Nations* in support of the classification given.

Mr. Justice Iredell, the only other member of the court who gave any reasons for his opinion, also declined to acquiesce in the definition suggested by Mr. Justice Chase, and confined his conclusions strictly to the case in hand:

There is no necessity, or propriety, in determining what is or is not, a direct, or indirect, tax in all cases. Some difficulties may occur which we do not at present foresee. Perhaps a direct tax in the sense of the Constitution, can mean nothing but a tax on something inseparably annexed to the soil:

something capable of apportionment under all such circumstances. A land or a poll tax may be considered of this description. The latter is to be considered so particularly, under the present Constitution, on account of the slaves in the southern states, who give a ratio in the representation in the proportion of three to five. Either of these is capable of apportionment. In regard to other articles, there may possibly be considerable doubt. It is sufficient, on the present occasion, for the court to be satisfied, that this is not a direct tax contemplated by the Constitution, in order to affirm the present judgment.

These opinions do not in the least indicate that taxes on personal property in general were regarded as indirect, but merely that the carriage tax was regarded as a tax on consumption and not a property tax. The court distinctly refused to determine the meaning of the term "direct taxes." The suggested definition was not even the means by which the court arrived at its conclusion; it was entirely *obiter*. Yet it may be held to have some value, not as a judicial precedent, but as historical evidence. Much stress has been laid upon the circumstance that two members of the court were distinguished members of the constitutional convention. But neither of these members expressed any opinion in favor of the exclusive definition of direct taxes. The only one of them who discussed the matter at all was Mr. Justice Paterson, who considered the definition "questionable," and adhered strictly to the economic classification then in vogue. He was the only member of the court who spoke with any certainty on the subject, and he declined to express the opinion that land and capitation taxes were the only direct taxes; he contented himself with saying that they were the *principal* direct taxes the framers of the Constitution had in mind, which may be conceded on all hands. There is a vast difference between saying that the members of the convention had in mind chiefly the forms of direct taxation then most generally in use, and asserting that they intended to exclude all other forms.

A peculiar chain of circumstances, involving three other decisions of the supreme court, leads up from the Hylton case to the first case involving an income tax. After the Hylton case the suggested definition of direct taxes slumbered for more than seventy years, and seems to have gained strength in the

meantime. The meaning of the term was again called in question in 1868 in the case of *Pacific Insurance Co.* vs. *Soule*,[1] although it was not in that case the principal question at issue. This case is sometimes referred to as if it involved an income tax; but the tax in question was really a business tax on insurance companies, measured by their premiums and dividends. After quoting the *dicta* of Justices Chase and Paterson in the Hylton case, and citing commentators who based their statements upon those *dicta*, the court reached its conclusion by means of this extraordinary logic:

> If a tax upon carriages, kept for his own use by the owner, is not a direct tax, we can see no ground upon which a tax upon the business of an insurance company can be held to belong to that class of revenue charges.

The impracticability of apportioning a business tax on insurance companies was given as an additional reason for sustaining the tax as it stood.

Although the reasons given are not satisfactory, the court was probably right in its decision. But it by no means follows that an income tax is also indirect. A business tax, even so far as it is measured by dividends or receipts, is essentially different from a general income tax, and one may easily be indirect while the other is direct. Such, indeed, is the case according to the most commonly accepted economic classification, based upon incidence. It makes all the difference in the world in the incidence of a tax whether it is a general or an exclusive tax. A general income tax cannot be shifted; a tax on the income of a particular business generally can be.[2] There is as much difference between a tax on a particular business and a general income tax as there is between a tax on pleasure carriages and a general property tax. Perhaps even a greater difference; but the distinction in either case is so obvious that it ought not to be necessary to point it out.

The other two decisions have even less relation to an income tax. In *Veazie Bank* vs. *Fenno*[3] (1869) it was decided that the

[1] 7 Wallace 433.

[2] Cf. SELIGMAN, *The Shifting and Incidence of Taxation*, 2d edition, p. 289.

[3] 8 Wallace 533.

tax on the circulation of state banks was not a direct tax, largely because Congress had never actually apportioned any but land and capitation taxes; and the opinion continued:

> And it may further be taken as established upon the testimony of Paterson, that the words direct taxes, as used in the Constitution, comprehended only capitation taxes, and taxes on land, and perhaps taxes on personal property by general valuation and assessment of the various descriptions possessed within the several Estates.

The succession tax was sustained in 1874 in *Scholey* vs. *Rew*.[1] It was held not to be a tax on real estate, but on the devolution of real estate, or on the right to become the successor. With regard to the meaning of direct taxes the court said:

> Whether direct taxes in the sense of the Constitution comprehend any other tax than a capitation tax and a tax on land is a question not absolutely decided, nor is it necessary to determine it in the present case.

The tax on bank circulation was properly classed as indirect, for it is a tax on a special privilege, or a particular act. The succession tax, on the other hand, is a direct tax in the ordinary sense of not being shifted. But among writers on taxation there are at least four different criteria for distinguishing between direct and indirect taxes. According to these four modes of classification, direct taxes are (1) those finally borne by the persons from whom payment is demanded; (2) taxes on revenue, as distinguished from taxes on expense; (3) taxes assessed at regular intervals by means of rolls of taxpayers' names; (4) taxes assessed directly upon immediate and permanent manifestations of taxpaying ability. It may be noted in passing that the income tax is direct according to all these criteria; but according to the last two, which are administrative rather than strictly economic, the succession tax is indirect, and it is so classified on the continent of Europe by economists and administrative officials alike. In such a case as this it was eminently proper for the court to give the government the benefit of the doubt.

All these cases, then, were decided correctly, although the reasons given by the court are not always convincing. And

[1] 23 Wallace 331.

none of these decisions is reversed by that of 1895, which had to do only with an income tax. Indeed, the court took especial care not to overrule, even in *dictum*, those decisions which had sustained "taxation on business, privileges, or employments."[1] As for the theory that "direct taxes" meant only land and capitation taxes, that had never been determined. In no case had the court been called upon to pass upon that hypothesis; and indeed it is difficult to see how a case could be brought which would require such an exclusive definition.

The chief stumbling-block remains to be considered. The case of *Springer* vs. *United States*[2] had to do with an income tax; but even the decision in this case has not necessarily been reversed. As the court pointed out in the first decision of *Pollock* vs. *Loan and Trust Company* in 1895, Mr. Springer's income was derived wholly from professional earnings and interest on United States bonds, and the validity of the tax as to either source was sufficient to sustain the action, which was an action of ejectment brought on a tax deed issued on the sale of real estate for income taxes.[3] The court was not required to decide whether the income tax was constitutional as a whole, but only whether it could be levied upon either part of the income in question. The validity of the whole income tax not being a necessary consequence of the Springer case, what part of the tax was sustained? The conclusion of the court was expressed in the following comprehensive language:

> Our conclusions are, that direct taxes, within the meaning of the Constitution, are only capitation taxes, as expressed in that instrument, and taxes on real estate; and that the tax of which the plaintiff in error complains is within the category of an excise or duty.

The doctrine contained in the first part of this sentence, now for the first time announced in this extreme form and positive manner, is obviously *dictum* still. May not the second part of the sentence also be considered *dictum* in so far as it does not apply to the case at issue? It was in order for the court to sustain the tax in its application either to professional earnings or to

[1] 158 U. S. 635. [2] 102 U. S. 586. [3] 157 U. S. 578, 579.

interest on government bonds; but the language of the opinion is so general that there is nothing to show which part of the tax was really sustained. Where there is such uncertainty, there is nothing to bind the court in future decisions. If it had been clearly and necessarily decided in the Springer case that a tax on income from United States bonds was indirect, the decision of 1895 would be a reversal of that much of the decision. But it was not so decided; and as Mr. Chief Justice Fuller remarked, "We are considering the rule *stare decisis*, and we must decline to hold ourselves bound to extend the scope of decisions."[1] Certainly the income tax cases of 1895 do not reverse any decision sustaining a tax on professional earnings; that part of the income tax of 1894 was not annulled on the ground of unconstitutionality, but only because other parts of the tax were held to be unconstitutional, and the tax was evidently intended as an indivisible whole.

But even if this decision were a reversal of the Springer case, and to that extent a breach of the rule *stare decisis*, it would be abundantly justified by the new light thrown upon the subject by the historical researches of counsel and court. These scholarly investigations form a striking contrast to the somewhat hasty consideration of the Springer case, which seems not to have been presented to the court in the most thorough manner possible. Mr. Springer cited numerous political economists in support of the economic definition of direct taxes, but the historical evidence was comparatively meager. The assistant attorney-general, *contra*, submitted a remarkable brief, in which, blindly following the lead of his predecessor in *Scholey* vs. *Rew*, it was attempted to prove the income tax indirect by a spurious reference to Roman law! Gibbon's *Decline and Fall* was cited as authority that the Romans recognized only land and capitation taxes as direct taxes; but the only foundation for this important discovery was a footnote or two in which the editor of Gibbon made his own classification of the Roman taxes.[2]

[1] 157 U. S., 579.

[2] The reference was "1 GIBBON'S *Decline and Fall*, chap. vi. on pp. 190 *et seq.*" The footnotes are Smith's, and are found in Harper's edition at pp. 416–423.

The decision of the court also was vulnerable at more than one point. It rested upon the *dicta* of the four preceding cases; and the astounding assertion was made that "all these cases are undistinguishable in principle from the case now before us, and they are decisive against the plaintiff in error." As in *Veazie Bank* vs. *Fenno*, the court supported its conclusion also upon the mere circumstance that Congress had never as a matter of fact apportioned any taxes except upon real estate and slaves. According to this mode of proof, if no taxes had ever been apportioned, there would have been no direct taxes; and on the other hand, the rule of uniformity, as distinguished from apportionment, would be applicable only to those taxes to which it had actually been applied. No new form of taxation would be possible under either rule. The court was at great pains to exclude the income tax from Hamilton's enumeration of direct taxes in his Hylton case brief, by arguing that it was not a tax upon the "whole personal estate," but only on the income during a year, or a small part of the estate; and yet in the concluding *dictum* Hamilton's authority was entirely rejected. Attention has sometimes been called to the fact that the tax involved in this case was a war measure, which the court would naturally be very reluctant to annul; but it is even more significant that the case was decided long after the law in question had been repealed, when an adverse decision would have served no useful practical purpose at all comparable with the resulting confusion. It is impossible that this consideration should have had no influence with the court. It was the wrong time to make a test case; and this should be considered in estimating the weight to be attached to the decision as a precedent.

From our present point of view the apportionment of taxes according to population seems distinctly unjust, and it may be conceded that it can never again be resorted to unless to avert impending disaster. Yet it is not difficult to see why the comprehensive rule requiring apportionment of all direct taxes was inserted in the Constitution. There was as yet little sense of national unity; the Union was only just emerging from the

Confederation. Where relations to the general government were concerned, the states, and not individuals, were still regarded as the units; and the circumstances of the compromise made it natural that the rights of the states should be more carefully considered than absolutely equal justice between citizens of different states. Moreover, the founders of the Republic were deeply imbued with the idea that taxation and representation should go together. The provision for apportioning direct taxes was a practical improvement upon the plan of requisitions in force under the Confederation,[1] and it was calculated to prevent the particular abuses then most feared. And finally, as was pointed out in the constitutional convention, the inequalities of fortune were then so inconsiderable that apportionment involved no great injustice even as between individuals.

At last we have an interpretation of the constitutional rule of taxation reached after the most thorough research by counsel on both sides and by the court itself, and based not upon *dicta*, but upon all the historical evidence obtainable and upon the plain meaning of the language employed. For those who object to the decision as a dangerous infraction of the rule *stare decisis* to hope that this decision itself may be reversed, is the height of inconsistency. The mode in which the decision was reached is perhaps more open to criticism than the substance of the decision itself. It was based largely upon the idea that the words of the Constitution ought to be taken in their "natural and obvious sense," and yet it was reached by the roundabout process of declaring taxes on real and personal property to be direct, and taxes on the income from property to be equivalent to taxes on the property itself. This manner of reasoning may have been necessitated by the differences of opinion in the court itself, and by the desire to avoid even the appearance of overruling former opinions; but it would certainly have been much simpler, and as completely in accord with the "natural and obvious" meaning of words, to say that the income tax was

[1] BULLOCK, *Finances of the United States from 1775 to 1789*, pp. 153–164; *Political Science Quarterly*, vol. xv. p. 218.

direct because it was an income tax. It might then still have been possible to impose separate taxes on most of the constituent parts of income, somewhat after the manner of the English income tax; for, as we have seen, a partial tax need not be considered direct because a general tax of the same kind is. A system of separate taxes, even if it affected nearly all kinds of income, might have been separately declared to be indirect with a much less violent stretching of terms than was required in the Springer case, for example, in calling the income tax as a whole an excise or an indirect tax. But the opinion of the court as it stands since 1895 seems to preclude the taxation of income from property as such.

III.

The desirability of an income tax is a distinct question; but here also there is much confusion of thought. An impression seems to prevail that there is some peculiar virtue (or vice) in an income tax which makes it, even when levied at a proportional rate, an instrument for bringing about a greater equality between rich and poor. This impression is due largely, no doubt, to the very generous exemption in the income-tax law of 1894; but exemptions are equally applicable to other direct taxes. The fact is that an income tax is no more favorable to the poor than many other forms of taxation. Its abstract justice is defeated by its practical defects, some of which it seems impossible to remedy. It falls most heavily not upon the largest incomes, but upon those whose amount can be least readily concealed. The man with a salary cannot escape; the man of wealth can, according to the elasticity of his own conscience. The income tax punishes honesty and puts a premium upon perjury. There is nothing in the nature of the tax which makes it easier to assess justly than the state taxes on personal property; the superior federal administration might save it from becoming a farce (as the still better administration of Prussia makes it a partial success), but could never make it operate equally. The comparative success of the Civil War income tax in its early years was due chiefly to the extraordinary patriotism of the war

period, which would not even question the constitutionality of the tax as long as the war continued. As soon as the war was over the receipts suddenly began to dwindle away.[1] Even the English income tax, with its principle of taxing each constituent part of income at its source, is weak in one of its most important parts, where that expedient is not practicable.[2]

It remains to consider what sources of revenue are still open to the national government. The customs and the internal revenue are usually sufficient for its needs, but among those who regret the annulment of the income tax are many who hope to see protective tariffs disappear. Even this change of policy, however, need not be accompanied by any very great diminution of the customs revenue, as the history of free trade in England abundantly proves. It is possible that a tariff for revenue only might be made quite as productive as a tariff for protection. As for the internal-revenue system, the war revenue act of 1898 gives an idea of some of the ways in which it is capable of extension in an emergency, without resorting to the taxation of incomes, and without imposing any very severe burdens upon anyone. It was only necessary to increase the very light taxes on malt liquors and tobacco and to levy new taxes on a few kinds of business, on certain business documents and proprietary articles, and on legacies. A tax was also levied on mixed flour, but this was for purposes of regulation. In studying this act nothing is more noticeable than the large number of possible sources of revenue which were passed over because they were not needed. For example, the tax on the gross receipts of corporations, proposed by the senate finance committee, if it had not been limited to refineries and pipe-line companies, would have produced a large revenue; and corporations engaged in interstate business would seem to be particularly appropriate for federal taxation, because the interstate complications which arise from their taxation by the commonwealths would be avoided,

[1] See WELLS, *Theory and Practice of Taxation*, p. 528.

[2] Cf. HILL, *The English Income Tax*, chap. 7. (*Economic Studies*, iv. pp. 367–388.)

and because taxation and regulation would go together.[1] It may even be that the trust problem could be partly solved by means of a system of progressive taxes on corporations.

There are various parts of the war revenue measure which may well be retained as permanent features of the internal revenue system. For example, there is no widespread demand for the abolition of the tax on sugar and oil companies, even if other corporations are not to be included with them; and so far as a business is in the hands of a monopoly, a tax on the gross receipts is not necessarily shifted to the consumers.[2] The legacy tax seems not to have had the anticipated result of discouraging the states from imposing similar taxes, and as the inheritance taxes levied by the states are never heavy and seldom apply to direct heirs, there is little cause for complaint in the addition of a federal tax. Even the stamp taxes, though they involve some inconvenience, seem on the whole to be paid willingly. But above all, the increased taxes on tobacco and liquors should be retained, though perhaps with some modifications. These taxes are free from the principal objections to indirect taxes in general; they are levied on articles of voluntary use, and they are apt to come partly, at least, out of the profits of the manufacturers and dealers, who enjoy a partial monopoly.[3] In so far as a tax increases retail prices, the effect is partly to diminish the amount consumed, which is not altogether to be regretted in the case of these particular luxuries, and partly to tax the consumers, to which there can be no objection unless the burden be unjustly distributed. Now the distribution of taxes on liquor and tobacco is doubtless more just than that of taxes on the consumption of necessities; indeed,

[1] Cf. ADAMS, *Science of Finance*, p. 496; "The Federal Taxation of Interstate Commerce," *Review of Reviews*, February 1899.

[2] Cf. SELIGMAN, *op. cit.*, pp. 286–288. It seems quite impossible to say whether or to what extent this tax actually has been shifted to the consumers. Since it was imposed the general tendency of prices has been upward in petroleum, but downward in sugar; but in neither case was there any increase of price at the time the act was passed or for some weeks thereafter.

[3] Cf. HOWE, *op. cit.*, p. 256.

Professor Neumann found from an examination of a large number of household budgets that in Germany the taxes on tobacco and wine at least actually took a smaller percentage from the incomes of the poor than from those of the rich and well-to-do.[1] In order to insure a just distribution of the burden, however, the taxes should be levied on an *ad valorem* basis, or at least differentiated according to quality.

There are many other possible sources of federal revenue, but it is not likely that they will be needed. The carriage tax might be reimposed and extended to automobiles; and there are many other articles of luxury, from yachts to billiard-tables, which might be made to contribute something, as they have in times past. The house tax of 1798 was levied as part of an apportioned direct tax; but the analogy of the Hylton case would seem to indicate that an unapportioned tax on rentals levied on the *occupiers* might be sustained as a tax on consumption, and therefore indirect. If so, it could be made a very fruitful source of revenue; and with the aid of progressive rates, it might be so contrived as to tax individuals approximately in proportion to their incomes.

If, notwithstanding all these latent resources, it should still be considered that a direct income tax ought to be levied—the Constitution points out the ways by which it may be amended. This is not an easy thing to accomplish, but it has been done, and to say that it cannot be done again is equivalent to saying that there is no strong, general demand for the change. It may be thought that a rejection of the rule of apportionment would be especially difficult to carry because of the opposition of those states to which the rule gives an advantage; but this consideration loses its weight when once it is thoroughly understood that taxes are never again to be apportioned in any case, unless possibly as a last resort in some great emergency. It would not be a question between apportioned and uniform direct taxes, but between uniform direct taxes and indirect taxes. A referendum would at any rate have an educational effect which

[1] *Zur Gemeindesteuerreform in Deutschland*, p. 18.

would make it worth while, whatever the outcome. It would be better under any circumstances to amend the Constitution than to misinterpret it; but when, as has sometimes been done, it is deliberately proposed to change its interpretation by "packing" the supreme court, and so subjecting that high tribunal to the vicissitudes of party politics, it is time for all good citizens to protest, and to point out the better way.

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